INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the three-judge District Court for the Central District of California (Appendix A, *infra*, pp. 15-19) is not yet reported.

JURISDICTION

On January 27, 1970, the three-judge United States District Court for the Central District of California, convened pursuant to 28 U.S.C. 2282, en-

tered an order permanently restraining the appellant and its agents from enforcing the provisions of 19 U.S.C. 1305(a) (the customs obscenity statute) on the ground that the statute on its face and as applied in this case violated the claimant's rights under the First and Fifth Amendments to the Constitution (see Appendix B, *infra*, pp. 20-21). A notice of appeal was filed in the district court on February 26, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1253, which allows a direct appeal to this Court from an order of a three-judge court properly convened under 28 U.S.C. 2282, granting a permanent injunction. See *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 5-7; *Flast* v. *Cohen*, 392 U.S. 83, 90-91.

QUESTIONS PRESENTED

1. Whether the United States may validly prohibit the importation of obscene matter for subsequent commercial distribution.

2. Whether a person importing obscene matter for commercial distribution has standing to challenge a statute also prohibiting the importation of such matter for private use and, if so, whether the statute is valid.

3. Whether the statute prohibiting the importation of obscene matter into the United States, 19 U.S.C. 1305(a), provides adequate administrative and judicial safeguards.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided, further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit informa-

tion thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

The pertinent facts were stipulated in the district court (Appendix C, *infra*, pp. 22-24). On October 24, 1969, claimant Luros returned to this country by airplane from Europe, arriving at Los Angeles. During the customs inspection, customs agents seized from his luggage the thirty-seven photographs involved herein,[1] a book entitled *Forbidden Erotica*, a book album of the works of one Peter Fende, and a "girlie" magazine. It was further stipulated that (Appendix C, *infra*, pp. 23-24):

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[1] We are lodging these photographs with the Clerk of this Court.

> Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37 photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra*. * * *

On October 31, 1969, the District Director of the Bureau of Customs wrote Luros, advising him that the matter had been referred to the United States Attorney for forfeiture action. On November 4, 1969, Luros' attorney wrote the District Director demanding the return of the seized material. On the following day, the United States Attorney's Office returned all the material seized except for the thirty-seven photographs. On November 6, 1969, the United States commenced the present action under 19 U.S.C. 1305(a) for forfeiture of the photographs as obscene. On November 14, 1969, Luros filed an answer and counterclaim contending that the photographs were not obscene and that 19 U.S.C. 1305(a) was unconstitutional. He moved to convene a three-judge district court under 28 U.S.C. 2282 to resolve these issues. After a hearing, that motion was granted; the three-judge court heard the case on January 9, 1970.

On January 27, 1970, the court concluded that the statute was invalid on its face, and entered a perma-

nent restraining order. It reasoned that since the legislation reaches "all obscene works" and "prohibits an adult from importing an obscene book or picture for private reading or viewing," it unconstitutionally infringed upon protected First Amendment activity under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, by depriving "a person who may constitutionally view pictures of the right to receive them." The court made this finding despite its recognition that claimant had not imported the pictures for his own personal or private use, but rather for inclusion in a book for commercial distribution; it concluded that *Freedman* v. *Maryland*, 380 U.S. 51, authorized this attack on the statute (see App. A, *infra*, pp. 16-17).

The court also ruled that the statute, both on its face and as applied in this case, granted excessive administrative discretion, *Freedman* v. *Maryland*, *supra*, in that it failed to provide a "specified brief period" within which the issue of obscenity had to be litigated in a judicial adversary proceeding (see App. A, *infra*, pp. 17-18).

THE QUESTIONS ARE SUBSTANTIAL

The holding below that 19 U.S.C. 1305(a) is unconstitutional on its face deprives the United States of authority to prevent the importation of obscene material into the Central District of California and, if affirmed, would deprive it of that authority throughout the nation. The holding casts doubt, as well, on the many statutes by which the federal and state governments proscribe the commercial dis-

tribution of obscene matter. In our view, this holding finds no justification in the Constitution and this Court's precedents, including its recent decision in *Stanley* v. *Georgia*, 394 U.S. 557.[2]

1. We deem it indisputable that the federal government has authority to prohibit the importation of obscene materials into this country for commercial distribution. Article I, Section 8, of the Constitution specifically grants Congress the power "To regulate commerce with foreign nations," and that power includes the power to "exclude merchandise at [its] discretion." *Brolan* v. *United States*, 236 U.S. 216, 219; *Weber* v. *Freed*, 239 U.S. 325, 329. *Roth* v. *United States*, 354 U.S. 476, makes plain that this power extends to materials which are "obscene"; that holding and subsequent cases following it "are not impaired" by this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557, 568, that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." Our views on the meaning of *Stanley* are set out at some length in the government's Brief as *Amicus Curiae* in *Byrne* v. *Karalexis*, No. 1149, this Term; we need not repeat that analysis here. It suffices to note that, on the stipulated facts, this is a purely commercial case—without even the patina of restrictions on access to the materials which appellees in *Byrne* claim protects them from state regulation.

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[2] The validity of the customs statute under *Stanley* is also pending before a three-judge court in the Southern District of New York. *United States* v. *Various Articles of Obscene Merchandise*, 68 Civ. 2972.

2. The district court's conclusion that the importation statute is impermissibly broad is incorrect, and in any event decides a question which ought not to have been reached in this case, since the commercial conduct here is the sort of conduct that would obviously be prohibited under any construction of the statute.

a. The district court apparently believed that the statute was overbroad because it prohibited even the importation of a single copy of an obscene item for private, non-commercial use by the importer himself.[3] As in *Byrne, supra*, the court relied for its interpretation of *Stanley* on this Court's statement in that case that "the Constitution protects the right to receive information and ideas," 394 U.S. at 564, as indicating that private individuals have a "right to receive" even matter which is "obscene."

But again, as we show in our *Byrne* brief, there is no right to receive obscene matter, as such. *Stanley* held only that the government lacks power to punish or bar the possession of obscene material "in the privacy of a person's own home," 394 U.S. at 564, where the interests protected by the First and Fourth Amendments tend to merge. It repeatedly affirmed the continuing vitality of "*Roth* and the cases fol-

[3] The court appears also to have reasoned that because rich persons could travel abroad, purchase obscene works, and bring them back to this country, the less affluent must be able to have access to such works through distributors who purchase and import the works for them. As the text shows the premise of this argument is incorrect. But even if the rich have such a right, it is difficult to take seriously the equal protection notion thus advanced. See the Government's brief in *Byrne, supra*, at p. 16 n. 12.

lowing that decision," 394 U.S. at 568. It is one thing to say that sexual conduct in the privacy of the home is of no legitimate concern to the state absent injury and complaint. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479. It does not follow, however, that the state lacks power to bar prostitution or its procurement or—of particular significance here—the transportation of women in interstate or foreign commerce for immoral purposes.

A customs inspection at the borders of the country is a very different matter from a police search through a private library or office. There is no right of privacy regarding the contents of one's trunks at the borders; books and papers may be examined without probable cause, if for nothing else than to see what may be concealed between their leaves. *Carroll* v. *United States*, 267 U.S. 132, 150-154. And if the state has the power to exclude from importation those matters which are "obscene," that power extends to single copies imported for what are said to be private purposes as well as avowedly commercial enterprises. Books in a private home or office may fairly be presumed to have come to rest; obscene matter in transit through the ports cannot be so regarded. If the material may be excluded without offense to the First Amendment, there is no right of privacy to require that, in assertedly private hands, it must nonetheless be free from inspection. Even as to private, noncommercial importations, then, *Stanley* does not control.

b. In any event, since appellee admitted that he was importing the pictures in question for commer-

cial purposes, he cannot be permitted to rely on the possible overbreadth of the statute as applied to others as a basis for freeing himself of its commands. It is clear that the statute is not unconstitutionally vague in its designation of what materials may not be imported. That issue was settled by *Roth*. This Court then adopted, and since has consistently applied, an approach to the obscenity question in which the issue is not the invalidity of statutory provisions on their face, but whether the provisions are invalid as applied. *E.g.*, *Ginzburg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Redrup* v. *New York*, 386 U.S. 767; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884-887, 921-922 (1970). Previous First Amendment cases permitting persons not directly affected by an alleged defect to raise a claim that a statutory scheme was invalid on its face, on the other hand, generally have involved issues of "vagueness" as well as "overbreadth." *E.g.*, *Thornhill* v. *Alabama*, 310 U.S. 88, 96-98; *Dombrowski* v. *Pfister*, 380 U.S. 479, 490-492; see *Freedman* v. *Maryland*, 380 U.S. 51, 57. Where vagueness is absent, there is no spectre of a possible "chilling effect" through uncertainty to justify an expansive attitude toward standing to raise the constitutional claims of others. Restrictive construction can be relied upon to eliminate any unconstitutional overbreadth. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962); Note, *supra*, 83 Harv. L. Rev. at 907-910.

Thus, even if the importation of obscene material for personal use could not be prohibited, there is no

occasion to permit commercial importers to assert those rights in defense of their own, quite different activities. Those commercial activities are "the sort of 'hard-core' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister*, *supra*, 380 U.S. at 491-492.[4] Whatever the impact of *Stanley* on the customs treatment of the person who imports obscene articles for his own private use, the court below departed from the settled approach of *Roth* by striking down the entire statute at the behest of a commercial importer of obscene material.[5]

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[4] An analogy can be drawn to the commercial solicitation cases. It is thus "not open to the solicitors for gadgets or brushes" to assert the First Amendment claims of noncommercial distributors of pamphlets or magazines. Compare *Breard* v. *Alexandria*, 341 U.S. 622, 641; *Valentine* v. *Chrestensen*, 316 U.S. 52, and *Ginzburg* v. *United States*, 383 U.S. 463, 475, with *Martin* v. *Struthers*, 319 U.S. 141. See Note, *supra*, 83 Harv. L. Rev. at 908-910.

[5] The court below found standing under *Freedman* v. *Maryland*, 380 U.S. 51 (see App. A *infra*, p. 17). That case held only, however, that any claimant may challenge the *procedures* of a licensing statute granting broad seizure power over alleged obscene material, where the sweeping nature of those procedures, on their face, substantially inhibits the exercise of rights of those who may be entitled to First Amendment protection. See 380 U.S. at 56-57; cf. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 683-684. *Freedman* did not deal with the question of a challenge raising the sufficiency of the "obscenity" standard itself. Moreover, as we show, *infra*, pp. 12-14, there is no warrant in this case for holding that the administrative procedures of 19 U.S.C. 1305(a) are invalid on their face (or invalid as applied in this case) under the rationale of *Freedman*.

2. The court below also erred, in our view, in holding that the procedures set out in Section 1305 (a) for resolution of the obscenity issue regarding imported materials are unconstitutional under *Freedman* v. *Maryland*, 380 U.S. 51, because they fail to provide a "specified brief period" within which the issue must be taken to court, and in holding that the procedures utilized in this case were deficient.

The validity of initial detention of questionable material by customs authorities is hardly open to challenge in light of the broad congressional power to regulate the importation of material and goods from foreign sources and the numerous regulatory purposes that detention serves. *E.g.*, *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490-491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4), reversed on other grounds *sub nom. Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50. Section 1305(a) authorizes administrative detention for only a short time, preliminary to a prompt judicial determination of the question whether the seized material is obscene. The seizure and forefeiture provisions of the statute are not rendered invalid because Congress did not fix exact time limits.

The statute provides that "[u]pon the seizure" of an article thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Under a companion

enactment, 19 U.S.C. 1604, the United States Attorney is required to commence such forfeiture proceedings "without delay" if he believes the material to be obscene. The statute thus contemplates swift administrative action (see *United States* v. *One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911, 918 (S.D.N.Y.); the *"Exclusive"* case, *supra*, 253 F. Supp. at 490-491) and consequent judicial dispatch consonant with a sound resolution of the question of obscenity (see *United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, *supra*, 367 F. 2d at 898-900; *United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"*, 373 F. 2d 635, 637 (C.A. 4), reversed on other grounds *sub nom. Potomac News Co.* v. *United States*, 389 U.S. 47; *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851, 853 (N.D. Cal.).

As pointed out by the Second Circuit in the *"491"* case (*id.* at 899), the legislative history of the statute, as well as its language, indicates that Congress intended that the issue of obscenity " 'be quickly submitted to the district attorney and to the court for determination.' 72 Cong. Rec. 5422 (1930)." And see *"Father Silas"*, *supra*, 249 F. Supp. at 916-918. In short, this customs statute meets the requirement announced by this Court in *Freedman* v. *Maryland*, 380 U.S. 51, 59, that "[a]ny restraint imposed in advance of a final judicial determination on the merits must * * * be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; see also *Manual En-*

terprises v. *Day*, 370 U.S. 478, 514-515 (Brennan, J. concurring).

There was no unreasonable delay in implementing the statutory scheme in this case, and appellee conceded below (Appendix A, *infra*, p. 18) that the government moved rapidly. It took less than two weeks to complete the administrative process from the time of the seizure to the filing of the forfeiture action. The fact that another two months elapsed before the court hearing was not due to the actions of the government, but to appellee's invocation of the three-judge court machinery to determine his contention that the customs statute in its entirety was unconstitutional. That delay thus did not arise from any defect in 19 U.S.C. 1305(a) regarding the procedures to be followed in adjudicating the issue of obscenity of the particular materials. Contrast *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

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Assistant Attorney General.

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ROGER A. PAULEY,
Attorneys.

APRIL 1970.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS, MILTON LUROS, CLAIMANT

MEMORANDUM OPINION

Before: Barnes, Circuit Judge, and Curtis and Ferguson, District Judges.

Ferguson, District Judge:

This is an action before a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine whether the government should be enjoined from enforcing 19 U.S.C. § 1305. That statute prohibits all persons from importing into the United States any obscene picture or book. It provides that when such an item appears at a customs office it shall be seized and held to await the judgment of a district court.

On October 24, 1969, Milton Luros returned to Los Angeles from a visit to Europe, arriving by plane. In his personal luggage he carried 37 photographs. In the course of an inspection, customs agents acting under authority of § 1305 seized the photographs as obscene. The agents referred the seizure to the United States Attorney, and on November 6, 1969, the government filed its complaint seeking judicial authority to enforce the forfeiture of the photographs.

On November 14, 1969, the claimant filed an answer contending the photographs were not obscene. His counterclaim contends that § 1305 violates the First and Fifth Amendments, and seeks an injunction to restrain the government from enforcing the statute in relation to the 37 photographs.

The case presents a five-fold constitutional attack on § 1305, claiming that:

> (1) It excludes from the United States photographs imported for use by adults in the privacy of their home.
>
> (2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.
>
> (3) It permits customs agents to seize and hold pictures without a time restraint.
>
> (4) It permits a seizure prior to an adversary hearing.
>
> (5) It is unconstitutionally vague.

The cornerstone of the attack, of course, is *Stanley* v. *Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis* v. *Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

19 U.S.C. § 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965), "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

A second attack on the statute further involves *Freedman* v. *Maryland*, *supra*. Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and

(2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

In the context of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

We are aware of *United States* v. *One Carton Positive Motion Picture Film*, 367 F.2d 889, 899 (2d Cir. 1966), which stated, "[S]pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme . . . ." That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman*, *supra* at 58-59, "[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period . . . go to court . . . ." We must follow *Freedman*.

We decline to consider as unnecessary the remaining attacks on the constitutionality of § 1305, *i.e.*, (1) vagueness and (2) the law set forth in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964).

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this memorandum opinion shall constitute the court's findings of fact and conclusions of law.

In accordance with the provisions of Rule 58, a judgment shall be separately prepared and entered as follows:

"1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

"2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

"3. The United States shall deliver said photographs to the claimant.

"4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

"5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal."

Dated this 27th day of January, 1970.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

We Concur:

/s/ Stanley N. Barnes
STANLEY N. BARNES
United States Circuit Judge

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS, MILTON LUROS, CLAIMANT

JUDGMENT ON COUNTERCLAIM

The court having filed its memorandum opinion which constitutes its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, and in accordance therewith, judgment is decreed in favor of the claimant, Milton Luros, on his counterclaim filed November 14, 1969, and against the United States of America, as follows:

1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

3. The United States shall deliver said photographs to the claimant.

4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the

claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal.

Dated this 27th day of January, 1970.

/s/ Stanley N. Barnes
STANLEY N. BARNES
United States Circuit Judge

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-2242-F

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, DEFENDANTS,
MILTON LUROS, CLAIMANT

STIPULATION OF FACTS IN REGARD
TO THE COUNTER-CLAIM

PURSUANT TO ORDER of the Court dated November 26, 1969, the parties hereto, through their respective counsel, stipulate to the following facts of the case in regard to the Counter-Claim:

1. On or about October 24, 1969, the claimant, Milton Luros, a citizen of the United States, returned to this country, following a visit to Europe. He arrived at Los Angeles, California on TWA Flight No. 761.

2. On October 24, 1969, Customs agents in Los Angeles, California seized from Milton Luros the 37 photographs named herein, together with a book en-

titled *Forbidden Erotica* by Rowlansan, a book album of the works of Peter Fende, and a "girlie" magazine. Attached hereto as APPENDIX A is Customs Receipt No. 586522.

3. On or about October 31, 1969, the District Director of the Bureau of Customs wrote claimant, advising him that the Bureau of Customs had referred the matter to the United States Attorney for the Central District of California for forfeiture action. A copy of the said letter is attached hereto as APPENDIX B.

4. On or about November 4, 1969, Stanley Fleishman, attorney for claimant, Milton Luros, wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. A copy of the said letter is attached hereto as APPENDIX C.

5. On or about November 5, 1969, Larry Dier, Assistant U. S. Attorney, released to Stanley Fleishman, attorney for claimant, Milton Luros, the following material, seized by Customs on October 24, 1969, as stated above: a book entitled *Forbidden Erotica* by Rowlansan, a book album of the works of Peter Fende, and a "girlie" magazine. A copy of a Release is attached hereto as APPENDIX D.

6. On or about November 6, 1969, the plaintiff instituted the within action.

7. On or about November 14, 1969, defendants and claimant filed an Answer and Counter-Claim.

8. Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37

photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra*. Claimant Milton Luros showed the Customs inspector the title pages of The Kama Sutra which the photographs were to accompany, and requested the Customs inspector to keep the photographs and title pages together. This the Customs inspector declined to do. Attached to the original of this Stipulation are the cover pages of The Kama Sutra as APPENDIX E. Attached to the copy of the Stipulation are xerox copies thereof.

DATED: This 15th day of December, 1969.

/s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants
and Claimant

DATED: This 19th day of December, 1969.

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